

1 REMARKS

2 Status of the Claims

3 Claims 1-56 are now pending in the present application; Claims 57-61 having been previously  
4 canceled. Claims 1, 13, 14, 21, 35, and 42 are amended to more particularly point out and claim the  
5 subject matter considered novel by applicants in light of the cited art.

6 Claims Rejected Under 35 U.S.C. § 102(e)

7 In the Final Office Action dated August 25, 2005, the Examiner rejected Claims 1-3, 7, 10,  
8 12-15, 19, 21, 22, 29, 31, 32, 35, 38, 40-43, 50, 52, and 53 under 35 U.S.C. § 102(e) as being  
9 anticipated by U.S. Patent Application No. 2001/0010059 (Burman et al., which is hereinafter  
10 referred to as "Burman"). The Examiner considered applicants' arguments and amendment filed on  
11 May 16, 2005, but was not persuaded. Applicants respectfully request that the Examiner reconsider  
12 the claims in this application in view of the above amendments to the claims and the following  
13 discussion.

14 In the interest of reducing the complexity of the issues for the Examiner to consider in this  
15 response, the following discussion focuses on independent Claims 1, 13, 14, 21, 35, and 42, all as  
16 amended. The patentability of each remaining dependent claim is not necessarily separately  
17 addressed in detail. However, applicants' decision not to discuss the differences between the cited  
18 art and each dependent claim should not be considered as an admission that applicants concur with  
19 the Examiner's conclusion that these dependent claims are not patentable over the disclosure in the  
20 cited references. Similarly, applicants' decision not to discuss differences between the prior art and  
21 every claim element, or every comment made by the Examiner, should not be considered as an  
22 admission that applicants concur with the Examiner's interpretation and assertions regarding those  
23 claims. Indeed, applicants believe that all of the dependent claims patentably distinguish over the  
24 references cited. Moreover, a specific traverse of the rejection of each dependent claim is not  
25 required, since dependent claims are patentable for at least the same reasons as the independent  
26 claims from which the dependent claims ultimately depend.

27 Preliminary Remarks

28 The Examiner's response to applicants' arguments included the following comment: "If  
29 Applicant wishes to preclude inclusion of machine instructions by reference, the Examiner  
30 recommends that the claims be amended to require the distributed application data (Web Page) and

1 machine instructions to be located in a single file, or a similar recitation which limits the number of  
2 files that may be transmitted." Applicants have amended Claims 1, 13, 14, and 21 in accord with the  
3 Examiner's suggestion as indicated above. Support for the amendments to claims 1, 13, 14, and 21 are  
4 provided at least by page 8, lines 24-28, page 17, lines 13-16 of applicants' specification. Additional  
5 support for the amendments to Claims 1, 13, 21, 35, and 42 are provided at least by page 19, lines 18-  
6 31, and page 20, Table 2, specifically, the actions identified at times t6-t9 regarding the loading and  
7 operation of a monitoring function.

8 The Examiner rejected Claims 1, 13, 14, 21, 35, and 42 over Burman. As noted above,  
9 applicants have amended Claim 1, paragraph (c), which now recites, "appending machine instructions  
10 that define a performance monitoring function to the distributed application data that were requested  
11 and transmitted over the network to the second site *as one data file*" (emphasis added). Burman does  
12 not disclose or suggest "appending machine instructions that define a performance monitoring  
13 function to [] distributed application data," which are then "transmitted over [a] network to [a] second  
14 site *as one data file*," as recited by applicants amended Claim 1. Instead, Burman specifically  
15 requires that "[a] web page sent or served to the user's browser during step 104 will include a link or  
16 reference to a rich media file, such as a script (e.g., JavaScript, VBScript) or an IFRAME reference to  
17 be fetched by the user's browser during step 106. (Burman, paragraph 47, lines 11 - 16.)  
18 Furthermore, Burman makes it clear that "upon receipt by the user's browser of the desired web page  
19 served during step 104, the user's browser will send or initiate a *fetch rich media request* during the  
20 step 106." (Emphasis added, Burman, paragraph 48, lines 1-4.) Clearly, Burman does not teach or  
21 even contemplate "appending machine instructions that define a performance monitoring function to  
22 [] distributed application data," which are then "transmitted over [a] network to [a] second site *as one*  
23 *data file*," as recited by applicants' amended Claim 1. For at least this reason, Burman does not  
24 anticipate or render obvious the recitation of applicants' Claim 1. Additionally, Claims 13, 14, and 21  
25 have each been similarly amended to recite that machine instructions are appended to distributed  
26 application data for transmission as one data file. Therefore, each of Claims 13, 14 and 21 are novel  
27 and nonobvious over Burman for at least the same reason as discussed above for Claim 1.

28 Furthermore, paragraph (d) of Claim 1 has been amended to recite that a performance metric  
29 is determined "without using the performance monitoring function to request any distributed  
30 application data from *any* site, *at least one performance metric being determined in connection with*

1 *timing of events occurring during the transmission of the distributed application data to the second*  
2 *site."* (Emphasis added.) This amendment thus clearly further distinguishes applicants Claim 1 over  
3 Burman, since "at least one performance metric is determined in connection with timing of events  
4 occurring during the transmission of the distributed application data to the second site," solely from  
5 the "distributed application data that were requested and transmitted over the network to the second  
6 site as one data file." Table 2 in applicants' specification details how the times at which events occur  
7 is used to determine various performance metrics, providing clear support and understanding for this  
8 added recitation to Claim 1. In contrast, Burman discloses that "the rich media script may also cause  
9 the user's browser to *fetch or request other images* so that transfer time and/or the user's bandwidth  
10 between the user's computer and other device connected to the computer network 22 may be  
11 determined." (Burman, paragraph 81, lines 8-10, emphasis added.) And Burman also teaches that  
12 "the rich media may initiate or run one or more nested sequences of one or more steps in the  
13 method 110 or initiate *a request for content to be served to the user's browser.*" (Emphasis added,  
14 paragraph 81, lines 14-17 of Burman.) Furthermore, Burman makes it very clear as evidenced by  
15 lines 1-22 of the Abstract of the reference that the purpose of the invention disclosed therein is to  
16 calculate the bandwidth between devices on a network in order to select which *additional* content  
17 will be served to a user's browser (i.e., so that smaller files will be served if the bandwidth is too  
18 limited). Simply stated, the disclosure and teaching of Burman is in direct contravention with  
19 applicants' amended Claim 1, which recites not only that performance metrics are determined  
20 "*without* using the performance monitoring function to request *any* distributed application data from  
21 any site," but also recites that a performance or browser monitoring function is determined "*in*  
22 *connection with timing of events occurring during the transmission of the distributed application*  
23 *data to the second site*" (emphasis added), and not based upon the timing determined when  
24 downloading other data. Therefore, it is impossible to practice Berman's invention according to the  
25 recitation of applicants' Claim 1, and Burman actually teaches away from applicants' Claim 1 by  
26 requiring additional steps that are contrary to the recitation in applicants' claim. Therefore, for each  
27 of these additional reasons, Claim 1 is patentable over Burman.

28 Each of Claims 13 and 21 have also been amended to recite that a performance or browser  
29 monitoring function determines performance metrics **without** using the performance or browser  
30 monitoring function "to request any distributed application data from any site" and to recite, "*at least*

1 *one performance metric being determined in connection with timing of events occurring during the*  
2 *transmission of the distributed application data to the client device"* (emphasis added). Therefore,  
3 Claims 13 and 21 are also novel over Burman for the reasons presented above for patentability of  
4 Claim 1.

5 Claim 35 has been amended to clarify that "*neither the compound performance metric nor the*  
6 *correlated performance metric [are] determined using the browser monitoring function to request any*  
7 *Web page from any site"* (emphasis added). As discussed above, Burman discloses and teaches that  
8 "the rich media script may also cause the user's browser to *fetch or request other images* so that  
9 transfer time and/or the user's bandwidth between the user's computer and other device connected to  
10 the computer network 22 may be determined." (Emphasis added, Burman, paragraph 81, lines 8-10.)  
11 Burman does not disclose or suggest any other method to determine "transfer time and/or the user's  
12 bandwidth between the user's computer and other device connected to the computer network."  
13 Therefore, Burman does not anticipate applicants' Claim 35 or render it obvious, since Burman fails  
14 to disclose or suggest what is recited by applicants' Claim 35. Furthermore, Burman explicitly  
15 teaches away from applicants' Claim 35, since no alternatives to the requesting an additional  
16 download are either explicitly taught or suggested by Burman, and the method of Burman cannot be  
17 implemented according to the recitation of Claim 35.

18 Claim 42 has been amended to clarify that the "machine instructions that perform a browser  
19 monitoring function" are implemented "**without** using the browser monitoring function to request  
20 any *further download* from any site, said at least one performance metric including at least one of  
21 compound performance metric and a correlated performance metric" (emphasis added). As discussed  
22 above, Burman does not disclose or suggest any method to determine "transfer time and/or the user's  
23 bandwidth between the user's computer and other device connected to the computer network," that  
24 can be accomplished **without** using the browser monitoring function to request a *further download*  
25 from a site. Therefore, Burman does not anticipate applicants' Claim 42, since Burman never  
26 discloses that which is recited by applicants' Claim 42. Furthermore, Burman explicitly teaches away  
27 from applicants' Claim 42, since the recitation of the claim is not explicitly taught or suggested by  
28 Burman, and the method of Burman cannot be implemented according to the recitation of Claim 42.

29 Dependent claims that depend from patentable independent claims are patentable for at least  
30 the same reasons that the independent claims are patentable. For this reason, claims dependent on

1 each of Claims 1, 13, 21, 35 and 42 are all patentable for each of the reasons presented above. For  
2 each of the above reasons, applicants respectfully submit that claims 1-56 are all patentable over the  
3 cited art.

4 Claims Rejected under 35 U.S.C. § 103(a)

5 The Examiner has rejected Claims 4, 6, 11, 16, 18, 23, 24, 26, 33, 34, 36, 44, 45, and 47 under  
6 35 U.S.C. § 103(a) as being unpatentable over Burman in view of U.S. Patent No. 6,411,998 (Bryant  
7 et al., hereinafter referred to as "Bryant"). Claims 5, 17, and 25 were rejected under  
8 35 U.S.C. § 103(a) as being unpatentable over Burman in view of Bryant and further in view of U.S.  
9 Patent No. 5,732,218 (Bland et al., hereinafter referred to as "Bland"). Claims 8, 27, 28, 37, 48, 49,  
10 54, and 56 were rejected under 35 U.S.C. § 103(a) as being unpatentable over Burman in view of  
11 Bland. The Examiner rejected Claims 9, 20, 30, 39, and 51 under 35 U.S.C. § 103(a) as being  
12 unpatentable over Burman in view of a non-patent publication entitled "A Survey of Web Caching  
13 Schemes for the Internet," authored by Jia Wang, Cornell Network Research Group, Department of  
14 Computer Science, Cornell University, Ithaca, NY (hereinafter referred to as "Wang"). Finally, the  
15 Examiner rejected Claim 55 under 35 U.S.C. § 103(a) as being unpatentable over Burman in view of  
16 Bland and further in view of Bryant.

17 It is axiomatic that a claim that depends from an allowable claim is also allowable for at least  
18 the same reasons. Claims 4, 5, 6, and 11 depend from independent Claim 1, dependent Claims 16,  
19 and 18 depend from independent Claim 14, dependent Claims 23, 24, 26, 33, and 34 depend from  
20 independent Claim 21, and dependent Claims 36, 44, 45, and 47 depend from independent Claim 42.  
21 For the reasons stated above, Burman does not teach or suggest the recitation of independent  
22 Claims 1, 14, 21, 35, and 42, and Bryant does not provide any teaching or suggestion that would lead  
23 one of ordinary skill in the art to achieve applicants' claimed recitation. Accordingly, the rejection of  
24 Claims 4, 6, 11, 16, 18, 23, 24, 26, 33, 34, 36, 44, 45, and 47 as being obvious over Burman in view  
25 of Bryant should be withdrawn.

26 Applicants respectfully submit that the rejection of Claims 5, 17, and 25 is unjustified and  
27 should be withdrawn. Claim 5 depends from independent Claim 1, Claim 17 depends from  
28 independent Claim 14, and Claim 25 depends from independent Claim 21. For at least the reasons  
29 discussed above, Burman does not disclose, teach, or even suggest the recitation of Claims 1, 14, and  
30 21, and neither Bryant nor Bland provide any further teaching that would cure this shortcoming.

1 Therefore, Burman in combination with Bryant cannot be a basis for rejecting Claims 5, 17, and 25,  
2 which depend from Claims 14, and 21, under 35 U.S.C. § 103. Accordingly, the rejection of  
3 Claims 4, 6, 11, 16, 18, 23, 24, 26, 33, 34, 36, 44, 45, and 47 as being obvious over Burman, in view  
4 of Bryant, and further in view of Bland should be withdrawn.

5 For similar reasons, the rejection of Claims 8, 27, 28, 37, 48, 49, 54, and 56 is improper and  
6 should be withdrawn. Claim 8 depends from independent Claim 1, Claims 27 and 28 depend from  
7 independent Claim 21, Claim 37 depends from independent Claim 35, and Claims 48, 49, 54, and 56  
8 all depend from independent Claim 42. For at least the reasons discussed above, Burman does not  
9 disclose or suggest the recitation of any of Claims 1, 21, 35, and 42, and Bland fails to provide the  
10 required teaching or suggestion that would justify rejection of these independent claims.  
11 Accordingly, the rejection of Claims 8, 27, 28, 37, 48, 49, 54, and 56 as being obvious over Burman  
12 in view of Bland should be withdrawn.

13 Applicants also respectfully submit that the rejection of Claims 9, 20, 30, 39, and 51 is also  
14 unjustified. Claims 9, 20, 30, 39, and 51 depend from independent Claims 1, 21, 35, and 42,  
15 respectively. For at least the reasons discussed above, Burman does not teach or suggest the  
16 recitation of any of Claims 1, 21, 35, and 42, and Wang fails to provide any teaching or suggestion  
17 that would justify the rejection of these claims. Therefore, Claims 9, 20, 30, 39, and 51, which  
18 respectively depend from Claims 1, 21, 35, and 42, are clearly not obvious over Burman in view of  
19 Wang.

20 Finally, the rejection of Claim 55 is unjustified. Claim 55 depends from Claim 42, and for at  
21 least the reasons discussed above, Burman, even in combination with Bland, and Bryant, fails to  
22 teach or suggest the recitation of Claim 42. Therefore, the combination of Burman, Bland, and  
23 Bryant cannot be properly used to reject Claim 55. Accordingly the rejection of Claim 55 as being  
24 obvious over Burman in view of Bland, and further view of Bryant should be withdrawn.

25 In view of the preceding remarks, it should be evident that this application is in condition for  
26 allowance and should be passed to issue without delay. Should any further questions remain, the  
27 Examiner is invited to telephone applicant's attorney at the number listed below.

28 Respectfully submitted,

29 

30 Ronald M. Anderson



Registration No. 28,829

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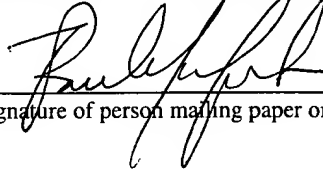
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